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Appealability of an Order Revoking Probation

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To apply contributory negligence to the seat belt fact pattern emphatically demonstrates the conflicting arguments concerning the doctrine. On the one hand, barring the plaintiff from recovery solely because of the failure to use the belt, which contributes not even an iota to the happening of the accident but may aggravate the injury, amply corroborates those who scorn the harshness of the contributory negligence rule. On the other hand, to travel only half the course and allow recovery for only those injuries not attributable to his conduct is to directly encounter the difficult problems which the doctrine attempts to avoid, especially that of apportionment.

As the question comes before the appellate court of each jurisdiction, an opportunity will be afforded to properly evaluate the arguments concerning the defense of contributory negligence and to make a decision for or against the encouragement of its continued existence. The court should carefully study the traditional arguments for the defense and take proper cognizance of the trend bringing about the decline of the doctrine and expanding the concept of negligence to compensate the victims of a wrong. It is submitted that if the proper balance is reached, this trend should be given a needed stimulant by refusing to entertain evidence of a plaintiff's failure to use an available seat belt. Such a holding could be precedent for preventing the defense of contributory negligence where plaintiff's alleged negligence is not a contributing cause of the injury, but merely a contributor to its severity.

APPEALABILITY OF AN ORDER REVOKING PROBATION

Probation is a relatively recent development in criminal law. It is the power, exercised in the discretion of the trial judge,[1] to suspend the sentence of a criminal offender and release him subject to the performance of certain conditions set forth by the trial judge. Violation of any one of these conditions may be the basis for revocation of the probation.

> [T]he defendant has the right to retain his probation status as long as he complies with the conditions attached thereto. Consequently to justify revocation of the probation, it must be shown that without excuse, he has committed such a breach of the conditions of the probation as justify its revocation. Otherwise stated, the revocation of probation must be fairly made, it must not be arbitrary, and the action of the court must be supported by reasonable grounds.[2]

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[1] *See, e.g.*, Comment, *Probationer's Right to Appeal; Appellant's Right to Probation*, 28 U. CHI. L. REV. 751, 752 (1961).

[2] 5 F. WHARTON, CRIMINAL LAW & PROCEDURE § 2194 (R. Anderson ed. Supp. 1967).

The standard condition most often employed is that the probationer behave lawfully during the period of probation. Such a condition has been found to exist by implication when it was not expressly stated by the trial judge.[3] Indeed, a probationer can be held to be in violation of such a condition even if he is acquitted of the subsequent charge. Thus, where hearsay evidence is not sufficient for conviction, it could be the basis for the revocation.[4] On the other hand, the mere fact that a probationer is held to have committed a crime does not preclude the conclusion that he is a law-abiding citizen. For example, a member of a political party was convicted and placed on probation for a conspiracy to disturb the peace as a result of certain violent and unauthorized means of protest. Subsequently, he was convicted for the peaceful act of placing posters on private property in violation of a much-neglected statute. Instead of finding a violation of his probation, the appellate court found that he did precisely what was desired of him. That is, he had learned to employ peaceful means of expressing political opinions instead of violent ones.[5]

Other often employed conditions are those of restitution, fine and imprisonment. The use of restitution as a condition is justified upon the theory that a criminal should bear the financial burden for the damage resulting from his acts.[6] Such payments are often used to offset the civil damages for the same acts.[7] With respect to fines and imprisonment as conditions of probation, there is the danger that the mere appellation "condition of probation" might enable the court to circumvent the maximum punishments set by law for the crimes involved. Thus, where the maximum fine for the offense was $200, a probationer was required by the trial judge to pay $1000 as a condition of his probation.[8] Although the states that allow imprisonment as a condition of probation are few and the term usually is of short duration, there is, nevertheless, the danger that the probationer may actually serve a longer term than he would have had he not been placed on probation.[9] After serving his short term, he then may violate one of his conditions and could thereby be resentenced to the

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[3] *E.g.*, State v. Chestnut, 11 Utah 2d 142, 356 P.2d 36 (1960).

[4] Scott v. State, 238 Md. 265, 208 A.2d 575 (1965).

[5] Swan v. State, 200 Md. 420, 90 A.2d 690 (1952).

[6] *See* Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 183 (1967).

[7] *Id.*

[8] The appellate court apparently realized the danger and reduced the fine. People v. Kuhlman, 86 Cal. App. 2d 566, 195 P.2d 53 (Dist. Ct. App. 1948).

[9] *See* Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 184-85 (1967).

maximum term. In such a case, the original probationary term, together with the term resulting from revocation, results in incarceration for a period greater than the maximum term for the original crime.

Aside from these standard conditions, the trial court usually has broad discretion to fashion the conditions to the particular requirements of the individual defendant.[10] For example, one convicted for a narcotics violation may be required to be under the care of a doctor.[11] Although other conditions which may be imposed, such as restrictions on probationer's social and business relationships,[12] can be repressive, the purpose of probation is nevertheless seen as a humanitarian one. Its principal focus is on the rehabilitation of the criminal by returning him to society instead of incarcerating him in the unhealthy atmosphere of a prison. It is hoped that under the proper supervision he will be able to readjust to society with the result that any further criminal behavior will be deterred.[13] In addition, it is recognized that probation affords the state substantial economic benefits since, by returning the offender to society, there is no need to support either the prisoner or his family.[14]

Historically, probation has been considered by some courts to be an outgrowth of the inherent power of the courts to suspend indefinitely either the imposition or the execution of sentence. The difference between the two is that where imposition of sentence is suspended, neither judgment nor sentence is ever entered, whereas if execution is suspended, the criminal is actually sentenced to a fixed term. The relevance of the distinction lies in the trial judge's sentencing power after probation has been revoked. Most statutes authorize the judge to sentence the criminal to any term that could originally have been imposed where imposition is suspended.[15] But, where execution is suspended, the term imposed upon revocation is usually restricted to the original term [16] or to a lesser term.[17]

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[10] A strong plea has been made that these conditions bear a functional relation to the particular situation so that the purposes of probation can be implemented rather than frustrated. Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181 (1967).

[11] People v. Turner, 27 App. Div. 2d 141, 276 N.Y.S.2d 409 (4th Dep't 1967).

[12] Note, *supra* note 10, at 187.

[13] 2 U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 1 (1939) [hereinafter cited as SURVEY].

[14] *See, e.g.*, Sparks v. State, 40 Ala. App. 551, 119 So. 2d 596 (Ct. App. 1959), *aff'd on other grounds*, 270 Ala. 488, 119 So. 2d 600 (1960).

[15] *E.g.*, ARIZ. REV. STAT. ANN. § 13-1657 (1956); COLO. REV. STAT. ANN. § 39-16-9 (1963); KY. REV. STAT. ANN. § 439.300 (1963).

[16] *E.g.*, ARIZ. REV. STAT. ANN. § 13-1657 (1956); CAL. PEN. CODE § 1203.2; WASH. REV. CODE § 9.95.220 (1951).

[17] *E.g.*, 18 U.S.C. § 3653 (1964); CONN. GEN. STAT. REV. § 54-114 (1958). *But see* COLO. REV. STAT. ANN. § 39-16-9 (1963); IND. ANN. STAT.

The jurisdictions accepting the theory that there is an inherent power in the courts to suspend sentences reason that such was the power that existed in the common law of England. In the much celebrated case of *People ex rel. Forsyth v. Court of Sessions*,[18] the New York Court of Appeals upheld the constitutionality of the then newly enacted suspension statute against a charge that the power infringed upon the executive power of pardon. The Court, however, went further and pointed out that the statute did not confer any new power, but was merely declaratory of the common law. Not all jurisdictions, however, accepted this reasoning. The most noteworthy rejection occurred in the United States Supreme Court in *Ex parte United States (the Killitis case)*.[19] The Court held that, absent any statute, the federal courts had no power to suspend a sentence indefinitely. Although it was true that, at common law, the English courts had such power, it did not follow that the federal courts were likewise empowered since the reasons for its existence no longer held true. At common law, suspension of sentence was resorted to as a temporary device to correct errors or miscarriages of justice which, under the modern federal and state systems, are subject to correction by review and new trials. Moreover, such power to refuse to enforce the punishment prescribed by the legislature was seen to rest exclusively in the executive power of pardon. Without attempting to weigh the validity of either approach, it is sufficient to note that the problem has been laid to rest by the passage, in most states, of legislation enabling the courts either to suspend sentence or to suspend sentence and place

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§ 9-2211 (1956); N.Y. CODE CRIM. PROC. §§ 470(a), 483(4); N.Y. PEN. CODE § 2188, which provide that in either case the term that could have been imposed originally may be imposed upon revocation.

According to Mr. Sayler, the chief United States Probation Officer for the Southern District of New York, the motivation behind the choice between suspension of imposition and execution often backfires. Impelled by the desire to give a strong warning to a criminal, the judge will often impose a sentence and then suspend it. Thus, it is hoped that the recognition of that from which he is being saved will be more clearly present in the probationer's mind and will more effectively work as a deterrent against violation. But, if in so doing, the judge does not impose the maximum term, the judge in charge of the resentencing is often handcuffed if he feels that the probationer should get a longer term. The result is, then, that the probationer is given a light sentence where, in the first place, the judge felt compelled to utter harsher warnings. (Information obtained from a telephone conversation with this researcher.)

[18] 141 N.Y. 288, 36 N.E. 386 (1894). *See also* State v. Buckley, 75 N.H. 402, 74 A. 875 (1909); Philpots v. State, 65 N.H. 250, 20 A. 955 (1890); State *ex rel.* Gehrmann v. Osborne, 79 N.J. Eq. 430, 82 A. 424 (1911); Commonwealth *ex rel.* Nuber v. Keeper, 6 Pa. Super. 420 (1898).

[19] 242 U.S. 27 (1916). *See also* Brabandt v. Commonwealth, 157 Ky. 130, 162 S.W. 786 (1914); Spencer v. State, 125 Tenn. 64, 140 S.W. 597 (1911).

the criminal on probation.[20] Even those courts which found an absence of an inherent power to suspend sentence upheld these statutes generally on the theory that the legislature has broad powers to set the punishment for the crime.[21]

At this point, some reference should be made to other forms of conditional release with which probation is often confused. As should be noted from the foregoing discussion, pardon is an executive function,[22] whereas probation is a judicial function. Another difference between the two is that pardon may be granted before or after sentence has begun, while probation is granted by the trial judge before service of sentence has commenced. Finally, a pardon may be granted unconditionally, *i.e.*, unlike the person on probation, the pardoned individual may become a free member of society without any fear of further liability.

Parole is the procedure most often confused with probation.[23] The basic difference is that parole is an administrative function performed by a parole board. These administrators, not the courts, decide whether a convict will be conditionally released. Second, parole usually occurs after one has already served a portion of his term. Probation occurs by the exercise of the discretion of the trial judge who feels that the criminal will be best rehabilitated without undergoing imprisonment. In other words, in most situations, probation precludes incarceration, assuming of course, that no conditions are violated.[24] Suspension of sentence is the last method to be confused with probation. Here, the difference is primarily that a suspension merely provides relief from incarceration without providing for any express conditions on which the continuation of the relief depends.[25]

Constitutional Protection and Probation

Despite the considerable growth of probation through legislation, the courts have generally maintained a restrictive attitude with respect to the probationer's procedural rights. One of the theories that has effectively contributed to this approach is the "act of grace" theory. Its inception dates back to the case of *Escoe v. Zerbst*,[26] wherein the United States Supreme Court established that, since probation exists as a matter of grace, there

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[20] *See generally* 2 SURVEY 3-10.

[21] *Id.* at 14. *See Ex parte* United States, 242 U.S. 27, 52 (1916); State v. Abbot, 87 S.C. 466, 470, 70 S.E. 6, 8 (1910).

[22] 2 SURVEY 2-3.

[23] 2 SURVEY 2.

[24] It is also assumed that imprisonment is not considered to be a proper condition for probation.

[25] *See* Cooper v. State, 175 Miss. 718, 168 So. 53 (1936).

[26] 295 U.S. 490 (1935).

was no constitutional requirement that the probationer be afforded an opportunity to be heard before his probation was revoked. The Court stated:

> In thus holding we do not accept the petitioner's contention that the privilege [opportunity to be heard] has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose.[27]

Nevertheless, the Court found that the language contained in the statute to the effect that the defendant is "to be arrested and brought before the court" mandated a hearing.

Many states have agreed with the Court that a hearing is not constitutionally required.[28] In construing a California statute which provided that the probationer "may" be taken before the court, the Supreme Court of California, in *In re Davis*,[29] applied the reasoning of *Escoe*, but then went even further by submitting that the administration of justice was better served by permitting *ex parte* revocations. Otherwise, a probationer who was imprisoned out of state or avoided arrest or service of notice until his probation period expired, could pass beyond the court's jurisdiction to impose sentence or execute the suspended one even though he proved himself unfit for probation.

Although the privilege-right conceptualizing embodied in the "act of grace" theory has proved sufficient, still another theory has been employed to restrict a probationer's procedural rights. Under the "contract theory," "the violation of the terms of probation is not a crime necessarily, and is not treated as a crime, but is rather in the nature of a breach of contract." [30] By accepting probation, the probationer agrees to abide by the conditions set down for him as well as the procedures employed in implementing the probation. In effect, by agreeing to probation, he waives any rights that he might have had to procedural due process and in its stead accepts whatever procedure is currently in force.

Even if a hearing is granted, claims that one is entitled to counsel, a trial by jury, or the right to confront witnesses, have

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[27] *Id.* at 492-93.

[28] *E.g.*, Fuller v. State, 122 Ala. 32, 26 So. 146 (1898) (executive parole); Johnson v. Walls, 185 Ga. 177, 194 S.E. 380 (1937) (parole); Pagano v. Bechly, 211 Iowa 1294, 232 N.W. 798 (1930) (suspended sentence); *Ex parte* Kuney, 168 Misc. 285, 5 N.Y.S.2d 644 (Sup. Ct. 1938), *aff'd without opinion*, People *ex rel.* Kuney v. Adams, 256 App. Div. 802, 9 N.Y.S.2d 403 (1st Dep't), *aff'd without opinion*, 280 N.Y. 794, 21 N.E.2d 621 (1939) (suspended sentence).

[29] 37 Cal. 2d 872, 236 P.2d 579 (1951).

[30] People v. Dudley, 173 Mich. 389, 396, 138 N.W. 1044, 1047 (1912). *See also In re* Young, 121 Cal. App. 711, 10 P.2d 154 (1932).

generally been confronted with similarly restrictive reasoning.[31] Apart from the act of grace and contract theories, the courts have, in addition, reasoned that these procedural rights do not apply to a revocation proceeding because it is not a criminal prosecution. In *People v. Dudley*,[32] the probationer alleged that the failure of the statute to provide for trial by jury, right to confront witnesses or the right to counsel rendered the statute unconstitutional. It was held, however, that these constitutional provisions did not apply since such a proceeding was not a criminal prosecution. In so holding, the court brought in the contract theory to reach its conclusion, viz., a violation of a condition of probation is not a crime, but rather a breach of contract.

It should be noted, however, that many statutes provide for the procedural rights discussed above[33] and, in addition, there is some authority that such rights are, in fact, constitutionally required.[34] The reasoning in such cases finding that due process is applicable has rested basically on the theory that even though probation is a matter of grace and the liberty is conditional, the probationer has a vested right in his liberty that may not be denied without due process. As one court recently stated, a probationer is "relieved of the ignominy of imprisonment, and may continue to support himself and his family. Clearly substantial interests accompany a probationer's status."[35] Recent law review articles have also argued that the traditional distinction between privilege and right should no longer apply.[36] Analogies have been made to the United States Supreme Court cases which have seriously impaired the validity of the doctrine of privilege

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[31] *E.g.*, People v. Dudley, 173 Mich. 389, 138 N.W. 1044 (1912).

[32] 173 Mich. 389, 138 N.W. 1044 (1912). *See also* United States v. Hollien, 105 F. Supp. 987 (W.D. Mich. 1952).

[33] Right to a hearing: *e.g.*, ALA. CODE tit. 42, § 24 (1958); N.J. STAT. ANN. § 2A:168-4 (1951); N.Y. CODE CRIM. PROC. § 935. Right to counsel: *e.g.*, ALASKA STAT. § 12.55.110 (Supp. 1962); FLA. STAT. ANN. § 948.06 (1944).

[34] Right to a hearing: *e.g.*, Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941); Lester v. Foster, 207 Ga. 596, 63 S.E.2d 402 (1951); State v. Zolantakis, 70 Utah 296, 259 P. 1044 (1927). Right to counsel: *e.g.*, People v. Valle, 7 Misc. 2d 125, 164 N.Y.S.2d 67 (Ct. Spec. Sess. 1957); Christiansen v. Harris, 109 Utah 1, 163 P.2d 314 (1945). Right to cross-examine: *e.g.*, Robinson v. State, 62 Ga. App. 539, 8 S.E.2d 698 (1940); People v. Oskroba, 305 N.Y. 113, 111 N.E.2d 235 (1953) (by implication).

[35] Sparks v. State, 40 Ala. App. 551, 554, 119 So. 2d 596, 598 (Ct. App. 1959), *aff'd on other grounds*, 270 Ala. 488, 119 So. 2d 600 (1960).

[36] *See, e.g.*, Hink, *The Application of Constitutional Standards of Protection to Probation*, 29 U. CHI. L. REV. 483, 493 (1962); Note, *Judicial Review of Probation Conditions*, 67 COLUM. L. REV. 181, 190 (1967); Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 326 (1959).

in the areas of public employment and admission to the bar.[37] If there is a vested right in public employment and admission to the bar, should there not be such a right to remain on probation? A revocation of probation involves a question of fact as to whether a condition was violated. Since the procedural rights in question are designed to assure the reliability of such a fact-finding process,[38] why should these procedural rights be denied to one contesting a charge that he is in violation of such conditions, which charge, if upheld, would result in his imprisonment?

With respect to the contract theory, the arguments made in its support seem likewise unconvincing. To say that there is any real choice between imprisonment and the relative freedom of probation is an absurdity. The better view would seem to be that in light of the coercive reality of a probation "offer" there is no likeness to a contract.[39]

Although questions still exist as to the procedural due process rights of a probationer, it would seem that substantive due process is clearly distinguished from its procedural counterpart and is generally found to be required in revoking probation.[40] Regardless of the procedure employed, a finding that there was a violation of a probation condition cannot be based upon mere whim or caprice. The foundation case for this principle is *Burns v. United States*,[41] decided by the Supreme Court just three years prior to *Escoe*. In *Burns*, the petitioner had been serving one sentence and was on probation for another, the terms of which provided that he conduct himself as a law-abiding citizen. While in jail, the petitioner was periodically permitted to visit his dentist. But he often abused the privilege and, consequently, had his probation revoked. The issue as framed by the Supreme Court was whether the trial judge abused his discretion in implying as a condition of his probation that the probationer should not commit acts inconsistent with obedience to his sentence. In so framing the question, the Court rejected the contention that the summary nature or the informal procedural aspects of the hearing were at all relevant on review. As the Court stated:

> The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles govern-

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[37] Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Slochower v. Board of Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952).

[38] Johnson v. New Jersey, 384 U.S. 719, 728-29 (1966).

[39] *See*, Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 324 (1959).

[40] *See, e.g.*, Scott v. State, 238 Md. 265, 208 A.2d 575 (1965); Annot., 29 A.L.R.2d 1074 (1953); Comment, *Due Process and Revocation of Conditional Liberty*, 12 WAYNE L. REV. 638, 650-55 (1966).

[41] 287 U.S. 216 (1932).

ing the exercise of judicial discretion. . . . While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.[42]

Nevertheless, the Court held that there was no abuse of discretion.

At this point, it is of value to consider what the "discretion" of the trial judge can involve. The trial judge can be said to have discretion in choosing the conditions of probation, in deciding whether the evidence supports a factual determination that the conditions were breached, and in deciding whether the alleged acts of the probationer, if true, are sufficient to justify a revocation of the probation. These questions of abuse of discretion and substantive due process seem particularly amenable to the appellate process. Such a determination rests on a review of the particular situation. In the procedural area, once it is established that there is such a constitutional right, there is in essence no issue left to be resolved other than whether the constitutional mandate is being obeyed. However, with respect to the kind of situation to which *Burns* was addressed, the availability of an appeal serves an important policing function. The trial judge is put on notice that his exercise of discretion will be reviewed, thus assuring as judicious a disposition as possible. Whether or not such an appeal will lie is the subject of the remainder of this note.

Reviewability in General

It is well established that an appeal does not exist as a matter of right.[43] It is a matter of statutory grant and, therefore, it is not a denial of due process not to allow an appeal. Whether an appeal will lie is, therefore, determined by considering the appropriate statutes. In New York, for example, the Code of Criminal Procedure, Section 517, which provides the defendant with an appeal as of right "from a judgment on a conviction in a criminal action or proceeding . . . ," is construed very strictly. In *People v. Gersewitz*,[44] it was held that an order denying a motion to vacate the conviction, since not expressly provided for in the statute, was not appealable. In reaching its conclusion, the Court indicated that such omission might be inadvertent, but, nevertheless, "the court has no power to supply even an inadvertent omission of the Legislature." [45] It should be noted that this omission was later rectified by the legislature.[46] Although construction is admittedly strict, it does not follow that absolutely

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[42] *Id.* at 222-23.

[43] *E.g.*, People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427, *petition for cert. dismissed*, 326 U.S. 687 (1945).

[44] *Id.*

[45] *Id.* at 169, 61 N.E.2d at 430.

[46] N.Y. Sess. Laws 1947, ch. 706, § 1.

no flexibility is allowed. Section 518, concerning the right of the state to appeal, provides that an appeal will lie "from a judgment of the defendant, on a demurrer to the indictment." In *People v. Rossi*,[47] the defendant contended that the statute could not be applied to a demurrer to a single count of an indictment containing nineteen counts, because it was not a "demurrer to the indictment." This contention was rejected as too strict. First, there was no meaningful distinction between stating the charges in separate counts or in one indictment, since each separate count could have been a separate indictment. Second, the use of the word "judgment" instead of "order" in the statute was not of significance since the allowance of a demurrer to one count finally disposes of that charge. Moreover, it would be awkward if the dismissal of one count could not be immediately reviewed, but had to await the judgment of conviction. The New York Court of Appeals refused to impute to the legislature an intent to create such a situation.

Another example of the strict construction of appeal statutes is the Illinois case of *People v. Kuduk*.[48] The Illinois Probation Act conferred jurisdiction on the lower appellate courts on appeal or by writ of error of orders modifying or terminating the probation period. The statute provided that "[t]he appellate courts of this State are hereby given jurisdiction finally to hear and determine all such appeals and writs of error." [49] The court held that since an appeal was purely statutory, the statute precluded the Supreme Court of Illinois from reviewing a decision of the appellate court.

In the federal courts, it seems that there is a more liberal attitude in allowing appeals.[50] The courts of appeals are given jurisdiction on appeals from "all final decisions." [51] This broad statutory language has accordingly not been given a narrow or technical construction.[52] A "final" decision is not necessarily the last possible order to be made in a case,[53] but

> [i]n criminal cases, as well as civil, the judgment is final for the purpose of appeal 'when it terminates the litigation . . . on the merits' and 'leaves nothing to be done but to enforce by execution what has been determined.' [54]

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[47] 5 N.Y.2d 396, 157 N.E.2d 859, 185 N.Y.S.2d 5 (1959).
[48] 388 Ill. 248, 57 N.E.2d 755 (1944).
[49] ILL. REV. STAT. ch. 38, § 798 (1943).
[50] United States v. Johnson, 142 F.2d 588 (7th Cir.), *petition for cert. dismissed*, 323 U.S. 806 (1944).
[51] 28 U.S.C. § 1291 (1964).
[52] Staggers v. Otto Gerdau Co., 359 F.2d 292 (2d Cir. 1966); United States v. Cefaratti, 202 F.2d 13 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 907 (1953).
[53] Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964).
[54] Berman v. United States, 302 U.S. 211, 212-13 (1937).

Under such a definition, the courts are concerned about the finality of the disposition, not the technicality of the terms. Thus, an order of probation whether before [55] or after [56] imposition of sentence has been considered final because, in realistic terms, it finally determined the fate of the defendant. There was no question as to his guilt and the only thing left was his imminent imprisonment. Recently, it seems the courts have become even more liberal in determining the finality of a decision, even though the legislative intent seems to be to do away with piecemeal appeals.[57] In *Gillespie v. United States Steel Corp.*,[58] the plaintiff sought recovery for negligence both under the Jones Act and local state statutes. The trial court upheld a motion to strike all complaints other than those based on the Jones Act. The Supreme Court, admitting that such an appeal might be considered piecemeal, nevertheless allowed the appeal in order to save the costs that would result from a delay. Similarly, the Court of Appeals for the Second Circuit recently allowed an appeal from the denial of a motion to substitute parties, which was admittedly not technically final, in order to avoid time-consuming and unnecessarily costly procedures.[59]

Review as the Proper Method of Appeal

Whether or not an appeal is liberally or strictly afforded, it appears to be the proper medium in most jurisdictions to review a contention that discretion was abused. One writer has stated that habeas corpus is a basic means of reviewing revocation proceedings.[60] It is, however, submitted that the scope is more limited with respect to habeas corpus as compared to an appeal.[61] It was expressly stated in *Escoe* that the proper review of alleged errors in conducting a revocation proceeding is by appeal, not by habeas corpus.[62] Historically, habeas corpus lies to review a claim that the petitioner is being illegally detained under a void order, or an order in which the issuing court had no jurisdiction over the petitioner.[63] Thus, habeas corpus is the proper remedy to review

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[55] Korematzu v. United States, 319 U.S. 432 (1943).
[56] Berman v. United States, 302 U.S. 211 (1937).
[57] National Brake & Elec. Co. v. Christensen, 258 F. 880, 882 (7th Cir. 1919), *rev'd on other grounds*, 254 U.S. 425 (1921).
[58] Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).
[59] Staggers v. Otto Gerdau Co., 359 F.2d 292 (2d Cir. 1966).
[60] *See, e.g.*, Comment, *Due Process and Revocation of Conditional Liberty*, 12 WAYNE L. REV. 638, 651 n.119 (1966).
[61] *See, e.g.*, Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 333 (1959).
[62] 295 U.S. 490, 494 (1935).
[63] *E.g.*, Comment, *Post Conviction Remedies*, 46 NEB. L. REV. 135, 137 (1967).

a revocation order issued without a hearing when a hearing is required.[64] Although it is true that the traditional limitation of habeas corpus, confining it to issues of whether the court has exceeded its jurisdiction or whether it has issued a void order, has undergone subtle changes so as to enable the petitioner to attack violations of procedural due process,[65] it nevertheless appears that it is still limited to attacks based on the allegation that the confinement is unconstitutional.[66] An appeal is generally considered the proper remedy for claims that discretion was abused.[67] In *Ex parte Kuney*,[68] it was held that even a gross abuse of discretion is not necessarily an excess of jurisdiction that will justify a writ of habeas corpus. It is, therefore, possible that even if an appeal is not allowed, habeas corpus will still be unavailable for review of an abuse of discretion. Since the term discretion is highly flexible, it follows that there can be no fixed meaning for abuse of discretion.[69] Abuse of discretion does not necessarily mean only bad faith, ulterior motive, or arbitrary conduct, but can be an erroneous conclusion clearly against the logic and effect of the facts before the court.[70] If it can be shown that the action taken was arbitrary and capricious, some jurisdictions allow review by habeas corpus.[71] But where the abuse lies in a misapplication of facts, it would appear that the proper remedy is by appeal.[72]

Since the power to revoke is broad, the scope of the appeal is somewhat limited, especially in comparison to an appeal of a conviction of a crime.[73] In *Manning v. United States*, it was stated as the following:

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[64] Escoe v. Zerbst, 295 U.S. 490, 494 (1935).

[65] People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 220 N.E.2d 653, 273 N.Y.S.2d 897 (1966). *See* Fay v. Noia, 372 U.S. 391, 409 (1963).

[66] *See* Comment, *Post Conviction Remedies*, 46 NEB. L. REV. 135, 140 (1967).

[67] *E.g.*, Escoe v. Zerbst, 295 U.S. 490 (1935); Burns v. United States, 287 U.S. 216 (1932); Manning v. United States, 161 F.2d 827 (5th Cir.), *cert. denied*, 332 U.S. 792 (1947).

[68] 168 Misc. 285, 5 N.Y.S.2d 644 (Sup. Ct. 1938), *aff'd without opinion*, People *ex rel.* Kuney v. Adams, 256 App. Div. 802, 9 N.Y.S.2d 403 (1st Dep't), *aff'd without opinion*, 280 N.Y. 794, 21 N.E.2d 621 (1939).

[69] *See* Kittrell v. State, 201 Miss. 514, 29 So. 2d 313 (1947).

[70] Adams v. Adams, 117 Ind. App. 335, 69 N.E.2d 632 (App. Ct. 1946); State v. Virgi, 84 Ohio App. 15, 181 N.E.2d 295 (Ct. App. 1948).

[71] *See In re* Davis, 37 Cal. 2d 872, 236 P.2d 579 (1951); McDonough v. Goodcell, 13 Cal. 2d 741, 91 P.2d 1035 (1939); Johnson v. Walls, 185 Ga. 177, 194 S.E. 380 (1937).

[72] Escoe v. Zerbst, 295 U.S. 490 (1935); Burns v. United States, 287 U.S. 216 (1932).

[73] Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 333 (1959). *See* Manning v. United States, 161 F.2d 827 (5th Cir. 1947); Swan v. State, 200 Md. 420, 90 A.2d 690 (1952).

A judge in such proceeding need not have evidence that would establish beyond a reasonable doubt guilt of criminal offenses. All that is required is that the evidence and facts be such as to reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the condition of probation.[74]

Although the review is admittedly limited, its mere existence, as stated above, tends to insure the proper exercise of discretion. The trial court should enumerate its reasons for the revocation and the appellate court is enabled to review the record.[75]

Jurisdictions Denying Appeal

Most jurisdictions do allow a probationer to take an appeal from an order revoking probation. Unfortunately, the reasons for the allowance of such an appeal are not clearly enumerated. It would appear that the underlying reason is to enable an abuse of discretion to be rectified.[76] In some jurisdictions such a right is expressly provided by statute.[77] There are, however, some jurisdictions where the appeal is explicitly not allowed or the situation is so confused that one cannot readily conclude when an appeal will lie.

In *Cooper v. State*,[78] a case involving a suspended sentence without probation, it was argued that an appeal was purely statutory. The statute provided for an appeal from a conviction, except in the case where the defendant pleaded guilty. Therefore, the statute in two ways precluded an appeal in that case. The first was that the defendant had pleaded guilty and the second was that revocation is not a conviction. Moreover, the court pointed out that probation is a matter of grace and solely within the discretion of the trial judge. That being the situation, the court accordingly would not allow an appeal unless the statute expressly so provided. Although the result is justified by the express provision which disallows appeals on a plea of guilty, it would have been illuminating had the court discussed more expansively why "conviction" does not include an order occurring after the defendant has already been found guilty, the effect of which is to place the defendant in the exact same position as he would have been had sentence been executed immediately after conviction.

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[74] 161 F.2d 827, 829 (5th Cir. 1947).

[75] *See* People v. Sims, 32 Ill. 2d 591, 208 N.E.2d 569 (1965).

[76] Sparks v. State, 40 Ala. App. 551, 119 So. 2d 596 (Ct. App. 1959), *aff'd on other grounds*, 270 Ala. 488, 119 So. 2d 600 (1960).

[77] ILL. ANN. STAT. ch. 38, § 117-3(e) (Smith-Hurd 1964); TENN. CODE ANN. § 40-2907 (1955); TEX. CODE CRIM. PROC. art. 42.12, § 8 (1966).

[78] 175 Miss. 178, 168 So. 53 (1936). *Accord*, Kittrell v. State, 201 Miss. 514, 29 So. 2d 313 (1947).

A more complex situation occurs in those jurisdictions which allow an appeal for a revocation of probation depending upon whether the execution or the imposition of sentence was suspended. The distinction rests on the theory that where the imposition of sentence is suspended, there is no final judgment to appeal.[79] For example, the California Penal Code, Section 1237, provides that a defendant may appeal as follows:

1. From a final judgment of conviction; an order granting probation shall be deemed to be a final judgment within the meaning of this section. . . .
3. From any order made after judgment, affecting the substantial rights of the party.

In *People v. Robinson*,[80] the Supreme Court of California, adhering to the "general rule," held that an order revoking probation *before* the entry of judgment was not an appealable order.[81] The court considered the order as intermediate, reviewable only on appeal from the final judgment. In *People v. Martin*,[82] another California case, such an order made *after* entry of judgment was appealable. This conceptual distinction has a certain symmetrical attraction, if no other. However, the problem then arose: what happens if upon revoking probation, the court does not sentence the probationer, but only modifies the terms of probation? Can there be an appeal from such an order? *In re Bine*,[83] doing some disservice to the symmetry as expressed, held that such an order is an order made after judgment and is appealable. Thus, by this circuitous route, California has seemingly allowed an appeal from a revocation, whether on review of the final judgment or by itself.

The purpose of the distinction between imposition and execution seems to have been intended to effectuate different sentencing powers of the trial judge upon revocation.[84] Its relevance to the appealability issue seems remote. The probationer, in either event, stands convicted of the crime and subject to punishment, and there is nothing further to be litigated. In fact, this distinction was considered to be "one of trifling degree" by the United States Supreme Court in holding that an order placing one on probation

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[79] *See* Annot., 126 A.L.R. 1210 (1940).

[80] 43 Cal. 2d 143, 271 P.2d 872 (1954).

[81] *Accord*, State v. Sharp, 138 La. 656, 70 So. 573 (1916); State v. Elder, 77 S.D. 540, 95 N.W.2d 592 (1959); State v. Farmer, 39 Wash. 2d 675, 237 P.2d 734 (1951).

[82] 58 Cal. App. 2d 677, 137 P.2d 468 (Dist. Ct. App. 1943).

[83] 47 Cal. 2d 814, 306 P.2d 445 (1957).

[84] *See* text relating to notes 15-17, *supra*; Hink, *The Application of Constitutional Standards of Protection to Revocation*, 29 U. CHI. L. REV. 483, 494-95 (1962); Note, *Legal Aspects of Probation Revocation*, 59 COLUM. L. REV. 311, 320-21 (1959).

without imposing sentence was a final decision from which an appeal would lie.[85] Such recognition by the Supreme Court makes for a strong argument that the proper concern is the probationer, not mere conceptualization. If the probationer is effectively imprisoned, it would seem that he should be allowed an appeal from the decision which results in his imprisonment.

In a relatively recent lower court opinion in Alabama, the problem as to the appealability of revocation was dealt with extensively.[86] Although the case dealt with a suspension of execution, its reasoning was sufficiently broad to come within the more desirable and more realistic approach. A final judgment was seen in practical and simple terms as "one which puts an end to the proceedings between the parties to a cause in that court, and leaves nothing further to be done." [87]

New York's Situation

At this time, the New York law concerning the appealability of an order of revocation is in conflict. Until recently, the appellate division departments that have spoken have, in memorandum decisions, denied that such an appeal lies.[88] The extent of the reasoning is a terse statement that appeal is by statute only, citing New York Code of Criminal Procedure, Section 517. The presumption is that since section 517 makes no express mention of an appeal from such an order, none can lie. The fourth department has, however, recently overruled itself.[89] An examination of the facts of this case will reveal why the court felt compelled to overturn the law. Appellant, a Negro and a drug addict, was sentenced on his plea of guilty to a charge of attempting to sell narcotics. He was placed on indefinite probation on the following condition: "To immediately go to the Buffalo State Hospital and be under the care of Dr. Burnett."[90] However, appellant signed himself out of the hospital after remaining there for a short period and then reported to probation supervision. He was there reinstructed and told to get a job and to continue living at home. A report filed by the probation department acknowledged that the appellant

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[85] Korematsu v. United States, 319 U.S. 432, 435 (1943).

[86] Sparks v. State, 40 Ala. App. 551, 119 So. 2d 596 (Ct. App. 1959), *aff'd on other grounds*, 270 Ala. 488, 119 So. 2d 600 (1960).

[87] *Id.* at 554, 119 So. 2d at 599.

[88] People v. Riley, 25 App. Div. 2d 915, 270 N.Y.S.2d 11 (3d Dep't 1966); People v. Terry, 21 App. Div. 2d 971, 252 N.Y.S.2d 703 (3d Dep't 1964); People v. Cocca, 13 App. Div. 2d 580, 211 N.Y.S.2d 722 (3d Dep't 1961); People v. Capria, 278 App. Div. 745, 103 N.Y.S.2d 358 (4th Dep't 1951).

[89] People v. Turner, 27 App. Div. 2d 141, 276 N.Y.S.2d 409 (4th Dep't 1967).

[90] *Id.* at 143, 276 N.Y.S.2d at 411.

had maintained a good record and mature attitude. Subsequently, however, the parents of a white girl swore out an affidavit to the effect that appellant had been seen often with their daughter and had been introducing her to narcotics. On the same day that the affidavit was submitted, a probation officer swore to an information that leaving the hospital without permission was a violation of the probation. The officer admitted, however, on cross-examination, that the condition as interpreted by him was ambiguous and the defendant could have left the hospital without intending to violate his condition. Probation was, nevertheless, revoked. Since it was not clear whether the revocation occurred because the judge was indisposed toward interracial relationships or whether the condition was actually violated, the appellate court held that the revocation was not a sound exercise of discretion.

In essence, the opinion states that since revocation of a probation order is a quasi-criminal proceeding, the defendant

> is entitled to appellate review to make certain that he was accorded those rights that constitute due process and that the trial court exercised a proper discretion in revoking probation. . . .
> [I]t . . . [has been said] that '"Our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved. . . ." So valuable a right should not be declared forfeited except in the clearest of cases' (citation omitted).[91]

The quotation above apparently represents an attempt to answer the well-established case law that an appeal is statutory only.[92] The soundness of the attempt is questionable. The court did not squarely confront the contention that such an appeal will only be allowed if expressly provided for by the statute.

It is submitted that there is a possible argument that can be made to justify the result reached by the fourth department. The reasoning suggested would have the term "judgment on a conviction," as stated in Section 517 of the New York Code of Criminal Procedure, include a revocation of probation. It is true that judgment on a conviction has a well-defined technical meaning. It refers not just to the plea or verdict of guilty, but also to the entry of judgment or sentence.[93] A similar parallel was attempted to be drawn in Texas.[94] The argument was there made by the probationer that uncorroborated testimony in a revocation hearing

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[91] *Id.*

[92] People v. Gersewitz, 294 N.Y. 163, 61 N.E.2d 427, *petition for cert. dismissed*, 326 U.S. 687 (1945).

[93] Commonwealth v. Palerino, 168 Pa. Super. 152, 156, 77 A.2d 665, 667 (1951).

[94] McDonald v. State, 393 S.W.2d 914 (Tex. Crim. App. 1965); Dunn v. State, 159 Tex. Crim. 520, 265 S.W.2d 589 (1954).

was not admissible pursuant to statutory language to the effect that a "conviction" cannot be had upon such testimony. The contention was rejected on the ground that a revocation of probation is not a conviction, but "a finding upon which the trial court may exercise his discretion by revoking or continuing the probation."[95] The reasoning seems conclusory at best. In any event, whether an appeal will lie is an issue different from whether the testimony was uncorroborated. An appeal goes to the foundation of the probationer's rights since it is the medium by which he can claim that he has been afforded improper treatment. Without the possibility of an appeal, the substantive question of whether the testimony was uncorroborated could never arise. An appeal, therefore, should properly be considered in a more liberal light. While it is true that, technically, a revocation is not a conviction, for all intents and purposes they are the same. The probationer's guilt is finally determined and he awaits only the impending incarceration. What reason, other than mere conceptualization, is there to conclude that the two are different? The better view would seem to be to construe the statute liberally and dispel such technicalities when a man's liberty is at stake.

Conclusion

Although met by judicial setbacks along the way, probation has progressed to a point where it has become commonplace in our criminal jurisprudence. It is representative of a humane attempt to understand and rehabilitate the criminal rather than punish him. One offered an opportunity for probation would welcome its grant. Content, therefore, with the court's light disposition, the probationer is unlikely to appeal from the judgment, assuming that a meritorious ground for appeal exists. If, while on probation, the probationer commits certain acts which the court deems to be violations of his probation, the probationer now finds himself awaiting the imprisonment of which he was previously relieved. If at this point the statute of limitations has run,[96] and the probationer is not allowed an appeal of the finding that he has violated his probation, he is virtually without any appellate remedy for his impending incarceration. Such a situation is not only immensely unfair to the probationer, especially since the conditions of the probation are not usually drawn with exactitude, but it also could prove unworkable since it essentially gives the trial judge a free reign. The discretion is broad, but it should not go unchecked.

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[95] McDonald v. State, 393 S.W.2d 914, 916 (Tex. Crim. App. 1965).

[96] *See* People v. Ector, 231 Cal. App. 2d 619, 42 Cal. Rptr. 388 (Dist. Ct. App. 1965); People v. Booth, 210 Cal. App. 2d 443, 26 Cal. Rptr. 717 (Dist. Ct. App. 1962).

Courts in the past have construed away technicalities in the interest of attaining the practical ends of justice.[97] The courts today that hold that no appeal lies from a revocation would do better to re-examine their reasoning. Without an appeal, the humanitarian goals sought to be achieved could very well go unfulfilled.

RES IPSA LOQUITUR: THE EXTENT TO WHICH PLAINTIFF MAY ESTABLISH NEGLIGENCE

The doctrine of *res ipsa loquitur,* while appearing simple on its face, is one of the more obscure doctrines to be found in the negligence area. Perhaps the most difficult problem inherent in this doctrine is, as has been pointed out in the recent New York appellate division decision of *Zaninovich v. American Airlines, Inc.*,[1] whether or not *res ipsa loquitur* should be applied where a plaintiff has proved specific acts of negligence. It is the purpose of this note to analyze the doctrine of *res ipsa loquitur* in general, with specific emphasis being placed upon the questions that arise as to the availability of *res ipsa loquitur* where a plaintiff has proved or attempted to prove specific acts of negligence committed by the defendant.

Res ipsa loquitur has been defined as "a common-sense appraisal of the probative value of circumstantial evidence,"[2] or as "a formulation of a species of circumstantial evidence."[3] The working definition offered here is that *res ipsa loquitur* is a procedural device whereby the plaintiff need not factually establish a prima facie case of negligence, an inference of negligence being logically deduced from the neutral circumstantial evidence introduced. The doctrine was first introduced into Anglo-American law in 1863 in the English case of *Byrne v. Boadle.*[4] In that case, plaintiff was injured when he was struck by a barrel of flour which fell from the window of defendant's store. Even though he failed to factually prove negligence or an intentional tort, plaintiff nevertheless was successful in his suit.

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[97] *See, e.g.,* Gillespie v. United States Steel Corp., 379 U.S. 148 (1964); Staggers v. Otto Gerdau Co., 359 F.2d 292 (2d Cir. 1966); People v. Rossi, 5 N.Y.2d 396, 157 N.E.2d 859, 185 N.Y.S.2d 5 (1959) and text accompanying notes 47, 58, and 59 *supra.*

[1] 26 App. Div. 2d 155, 271 N.Y.S.2d 866 (1st Dep't 1966).

[2] Galbraith v. Busch, 267 N.Y. 230, 234, 196 N.E. 36, 38 (1935).

[3] Zaninovich v. American Airlines, Inc., 26 App. Div. 2d 155, 157, 271 N.Y.S.2d 866, 869 (1st Dep't 1966).

[4] 159 Eng. Rep. 299 (Ex. 1863). *See* Bulman, *Res Ipsa Loquitur—When Does It Apply?,* 1961 INS. L.J. 20, 21.